

1 IN THE UNITED STATES DISTRICT COURT FOR THE  
2 NORTHERN DISTRICT OF OKLAHOMA

3 IN RE: )MDL DOCKET NO. 16-MD-2700  
4 )ALL CASES  
5 GENENTECH HERCEPTIN )Proceeding: Initial Case  
(TRASTUZUMAB)MARKETING )Management Conference  
6 AND SALES PRACTICES )Date: 6-23-16  
LITIGATION )Court Time: 10:00 a.m.  
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10 TRANSCRIPT OF HEARING  
11 Before the Honorable Terence K. Kern  
12 June 23, 2016.  
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23 ELIZABETH ANN BEHLES, CSR #121  
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THE COURT: This matter comes on for case management conference In Re: Genentech Herceptin, MDL docket's 16-2700 on here. I'm glad to see that so many of you were able to make it. You're traveling in packs for safety reasons?

All right. We've got a number of things to handle and this is our first meeting in this MDL case, and we'll try to establish as much as we can.

I think initially I need to get appearances for the Record, so if we could start with the plaintiffs, please.

MR. KEGLOVITS: Your Honor, Dave Keglovits on behalf of -- there are 15 cases and we represent 14 plaintiffs in 14 of those cases. I'm happy to go through each of those for your Honor if you want to hear each of those, but I just want to advise you that that's the allocation. Mr. Sill, Sill Law Group represents the plaintiff in the other case, the Comanche County Memorial Hospital case.

THE COURT: Okay.

1 MR. ADAMS: Steve Adams  
2 representing the plaintiffs, co-counsel with  
3 Mr. Keglovits.

00:01

4 MR. DOVERSPIKE: Adam Doverspike  
5 also representing the same co-counsel with Mr.  
6 Keglovits.

7 MR. SILL: Your Honor, James Sill  
8 representing Comanche County Memorial  
9 Hospital, and as indicated we are in the  
10 submission presented in court, as I'm sure his  
11 Honor has seen, asking that David be appointed  
12 as lead counsel, and that we be appointed as  
13 co-lead, so consequently I'll only be speaking  
14 when asked this morning.

00:01

15 THE COURT: All right.

16 MR. BERGIN: Christopher Bergin,  
17 also from the Sill Law Group on behalf of the  
18 Comanche County Memorial Hospital.

00:01

19 MS. TABATABAIER: Tara Tabatabaier  
20 also from the Sill Law Group on behalf of  
21 Comanche County Memorial Hospital as well.

22 THE COURT: All right. Is that all  
23 from the plaintiffs' side?

00:02

24 MR. KEGLOVITS: Your Honor, Bill  
25 O'Connor on behalf of Genentech, and with me

1 is Alicia Donahue and Jim Muehlberger.

2 MR. MUEHLBERGER: Good morning,  
3 your Honor.

00:02

4 MS. DONAHUE: Good morning, your  
5 Honor.

00:02

6 THE COURT: Good morning. There  
7 have been some late filings. We used to call  
8 that years ago, fillings that came over the  
9 transom. And you younger lawyers will not  
10 understand that terminology at all; it's a  
11 ventilation system in old buildings. You  
12 could just throw it over the top of -- the  
13 windows on top of the doors. And we'll get to  
14 those as they come up.

00:03

15 Okay. Mr. Keglovits, you indicated  
16 there are 15 cases now; you represent 14?

00:03

17 MR. KEGLOVITS: Your Honor, through  
18 this week there are actually 16 plaintiffs.  
19 We represent 15 of the plaintiffs. I believe  
20 there are 13 or 14 cases.

00:03

21 One of the cases is relatively new  
22 and thus has not been tagged with a  
23 conditional transfer order, so it might not be  
24 on what the Court has. It's -- the style is  
25 Blue Ridge Cancer Center in Virginia as the

1 plaintiff. The others I believe all have  
2 either been transferred to your Honor, or in  
3 the case of Shindell Oncology case, a  
4 conditional transfer order has been provided  
5 and should be --

6 THE COURT: Okay, and so there are  
7 some that we're unaware of. Let's talk about  
8 that while we have this opportunity.

9 What do you anticipate; what do you  
10 have knowledge of? Are there other cases that  
11 you believe are going to be included, or are  
12 there other cases that are -- will be filed?

13 MR. KEGLOVITS: There are other  
14 practice groups who are interested in  
15 participating, I think -- I don't want to get  
16 too deep into the issues, but from our  
17 perspective if we were permitted to file the  
18 Third Amended Complaint that we've asked the  
19 Court to allow us to file, which would include  
20 a national class allegation, that would make  
21 it unnecessary for us to continue to stand up  
22 using individualized actions in other  
23 jurisdictions. We're not aware of any other  
24 firms that are interested in bringing the  
25 case, at least at this point.

1 THE COURT: And if, in fact, a  
2 class action were allowed, what kind of  
3 numbers do you think you're looking at?

00:04

4 MR. KEGLOVITS: In terms of the  
5 number of class members?

6 THE COURT: Yes.

7 MR. KEGLOVITS: In the thousands.

00:05

8 THE COURT: Okay. So Herceptin was  
9 basically sold to and used by facilities  
10 throughout the United States, and those  
11 facilities would number certainly in the many  
12 hundreds, if not thousands.

00:05

13 MR. KEGLOVITS: Yes, your Honor.  
14 It's also sold outside of the United States,  
15 but as the proposed classes have been defined,  
16 at least at this point, those groups would not  
17 be included in this case.

00:05

18 THE COURT: All right. One of the  
19 matters that has been discussed that we need  
20 to determine is of service of additional  
21 cases. There was an indication that the  
22 plaintiff wanted to serve by email and that  
23 was objected to, and I think appropriately.

00:06

24 Mr. O'Connor, is there objection to  
25 service by a certified mail, return receipt?

1 MR. O'CONNOR: Your Honor, one of  
2 the issues was we have some foreign entities  
3 that have not been served. We don't represent  
4 them, and that -- and in addition to that,  
00:06 5 there was a concern on our side that any kind  
6 of email would be a potential waiver of  
7 jurisdiction, venue and other issues. So we  
8 had, prior to all of these additional suits  
9 coming in, and certainly long before we  
00:06 10 received the proposed Third Amended Complaint,  
11 we had talked about a stipulation that  
12 basically resolved any concerns we had on the  
13 defense.

14 So one thing we could certainly do  
00:07 15 is go back and try to reach this same  
16 stipulation or a similar one that would  
17 resolve some of the issues, not certainly with  
18 respect to the foreign entities, but would set  
19 forth a -- that it's not a waiver of defenses;  
00:07 20 that we were not agreeing to any kind of  
21 service by certified mail or otherwise of any  
22 parent or subsidiary or any division of  
23 Genentech. So we had kind of anticipated this  
24 when we first were preparing the proposed CMO.  
00:07 25 And I would ask your Honor if we could have



00:07 1 some time to maybe try to reach a similar  
2 stipulation that would outline the absence of  
3 any waiver on our part. We'd limit who, if it  
4 was service by certified mail, who that could  
5 be on, and still preserve the need for them  
6 to, you know, comply with the Hague convention  
7 and whatever else they'd do if they intended  
8 to pursue these foreign companies.

00:08 9 THE COURT: You want to have  
10 certified mail just to you and then you take a  
11 vacation? All right. Have the foreign  
12 entities been served?

13 MR. O'CONNOR: Not to our knowledge.  
14 There was --

00:08 15 THE COURT: There was some  
16 indication --

17 MR. O'CONNOR: They --

18 THE COURT: -- of service in the  
19 first few cases was considered appropriate.

00:08 20 There was service on Genentech, and  
21 there was certainly service on the United  
22 States Roche Holdings, but not on anybody  
23 else. And, frankly, as service has proceeded  
24 there hasn't been a whole -- any problems to  
00:08 25 our knowledge, so I don't understand why there

1 would have to be some novel service issue  
2 anyway. They've, they've accomplished it, and  
3 to date -- well, I don't think certified mail  
4 is novel though. We've had that for a while.

00:09

5 MR. O'CONNOR: Sure, yeah. We had  
6 had this stipulation in mind to try to --  
7 which we were on the eve of presenting to your  
8 Honor when more cases came along and new  
9 counsel came in.

00:09

10 THE COURT: Mr. Keglovits, do you  
11 care about the foreign entities?

12 MR. KEGLOVITS: Well, to be clear  
13 the only case that has foreign entities as a  
14 defense is Mr. Sills' Comanche County case.

00:09

15 And the stipulation that Mr. O'Connor is  
16 referring to, we think we've agreed to it.  
17 And then after we had had those discussions,  
18 the Comanche County case got filed and caused  
19 folks at this table to say, "Wait a minute, we  
20 need to back up off of it and decide what we  
21 want to do." So I'm doubtful after that, if  
22 that's okay with your Honor. And again, not  
23 to lobby too much for the Third Amended  
24 Complaint, but I think when it's filed then  
25 all this stuff kind of goes away.

00:09

00:09

1 THE COURT: I think that's  
2 certainly possible. But I'll give you ten  
3 days to come up with some, some agreement with  
4 regard to acceptance of service, and whatever  
00:10 5 appropriate stipulations you need for  
6 protection.

7 MR. SILL: And, your Honor,  
8 sometimes in comparable cases we've reached an  
9 agreement with defendants to dismiss one  
00:10 10 defendant upon the agreement that that  
11 defendant will indemnify the judgment, or good  
12 judgment, so we will also discuss that with  
13 the defendant.

14 THE COURT: Very well. There was  
00:10 15 an indication that the plaintiff wanted to  
16 directly file new actions in the Northern  
17 District and without filing them in the  
18 appropriate district and having been  
19 transferred to the MDL. The defendant  
00:10 20 objected to that. I'm not familiar with that  
21 as being a normal procedure, and I don't --  
22 unless the defendant were to consent, it seems  
23 like it raises venue problems that shouldn't  
24 be handled here. You still want to argue that?

00:11 25 MR. KEGLOVITS: Not really. Again,

1 that was one of the things we had worked out  
2 when the Comanche County case got filed on --  
3 different defendants served, and backed up off  
4 of that. So I think your Honor doesn't prefer  
00:11 5 that process. We had abdicated for it because  
6 it avoids the cost of local counsel in the  
7 jurisdictions --

8 THE COURT: All right.

9 MR. KEGLOVITS: -- and some  
00:11 10 administrative things, but it's not  
11 substantive.

12 THE COURT: What happens when the  
13 cases go back though, if they go back?

14 MR. KEGLOVITS: Under the  
00:11 15 stipulation that was discussed between the two  
16 of us, we would identify where the home  
17 district was, and then those cases would be  
18 transferred back to that home district in the  
19 direct filing.

00:12 20 THE COURT: Well, I'll leave that  
21 up to you. If you can reach an agreement,  
22 that's fine. I'm not going to require that.

23 On the point of plaintiffs' leadership,  
24 the request has been made that the Court  
00:12 25 appoint David Keglovits and Gable Gotwals as

1 lead counsel. And, Genentech had Matthew Sill  
2 on here who --

3 MR. BERGIN: Your Honor --

4 THE COURT: -- does someone have a  
5 preference here?

6 MR. SILL: My partner, Matthew  
7 Sill, wanted me to apologize for not being  
8 here today. He is the governor from the  
9 Oklahoma Association of Justice to the  
00:12 10 National American Association of Justice, so  
11 he's in Canada for the state meeting today and  
12 couldn't be here. But, yes, and I have -- for  
13 Matthew's defense, I have Matthew's short form  
14 bio, and he has served on steering committee  
00:13 15 and executive committee on a number of  
16 multidistrict litigations, and it is he rather  
17 than I we're asking you to appoint.

18 Might I approach the bench with  
19 this?

00:13 20 THE COURT: You may.

21 MR. BERGIN: Thank you. And I  
22 believe that the defendants, to the best our  
23 knowledge, have no objections to these  
24 appointments. And we're also asking that Mr.  
00:13 25 Keglovits and Mr. Sill be appointed as interim

1 class counsel, and the Court may want to  
2 address that a little later.

3 THE COURT: Mr. O'Connor?

4 MR. O'CONNOR: Your Honor, we do  
00:13 5 concur with the lead counsel and the co-lead  
6 counsel that they are -- they have come  
7 together on, but we think it's premature to  
8 appoint an interim class counsel at this stage.

9 We, for obvious reasons, think they  
00:14 10 have a huge hurdle on certification and we  
11 have some other issues that you're aware of on  
12 the preemption. But in any event, that's the  
13 only issue we had with the leadership  
14 structure was we thought it was premature to  
00:14 15 appoint interim class counsel at this point.

16 THE COURT: All right, the Court  
17 appoints Mr. Keglovits and Gable Gotwals as  
18 lead counsel, and Matthew Sill with the Sill  
19 Law Group as co-lead counsel.

00:14 20 One of the matters I referred to as  
21 coming over the transom was the plaintiffs'  
22 Motion for Leave to File a Third Amended  
23 Complaint.

24 Mr. Keglovits, you want to address  
00:14 25 that?

1 MR. KEGLOVITS: Yes, your Honor.  
2 It is our attempt to, as I earlier mentioned,  
3 create a cooperative case governing document  
4 that would bring together all claims of all of  
00:15 5 the parties that we as counsel see as  
6 appropriate in the first instance, and to  
7 reduce the need for some of these other  
8 administrative things.

9 Our hope is that working together  
00:15 10 with Mr. Sills' group, we can jointly propose  
11 a class definition of the motion to certify a  
12 class with jointly agreed upon claims. We  
13 spent a lot of time this morning working on a  
14 proposal to come to you with today on a number  
00:15 15 of items and got some good cooperation. So  
16 our hope is that when we have this Third  
17 Amended Complaint, if we get a chance to have  
18 a Third Amended Complaint, it's really going  
19 to streamline what's going to happen going  
00:15 20 forward in the case. It would include a  
21 request to certify a national class, your  
22 Honor.

23 THE COURT: You intend this Third  
24 Amended Complaint to govern the MDL?

00:16 25 MR. KEGLOVITS: That would be our

1 hope in consultation Mr. Sills' group, that  
2 would be the operative document for all  
3 parties claiming against Genentech.

4 THE COURT: Okay.

00:16

5 MR. KEGLOVITS: And in my  
6 judgment -- and one more thing. It doesn't  
7 really change the contour of the case as it  
8 stands right now. There are a group of  
9 practices that we represent, roughly a billion  
10 dollars' worth of purchases of this drug. Mr.  
11 Sills' group is abdicating for a national  
12 class already, and so it's really just going  
13 to bring it all together in one place.

00:16

14 THE COURT: And this pretty much  
15 assumes that Comanche County is one of them?

00:16

16 MR. KEGLOVITS: If we get together  
17 and get the right class definition and the  
18 right claims and the right defendants, it  
19 would.

00:16

20 THE COURT: Well, this Third  
21 Amended Complaint seems -- well, okay. What's  
22 the defendant position?

23 MR. O'CONNOR: Your Honor, now --

24 THE COURT: You can move that

00:17

25 microphone up just a bit, maybe we can turn it



1 up just --

2 MS. TURNER: We'll do both.

3 MR. O'CONNOR: We just saw -- we  
4 had this underlying tone from the plaintiffs  
5 throughout this of some supposed delay on our  
6 end, and yet all of the work we did in  
7 preparing the agenda and preparing a proposed  
8 CMO, never was there any mention of yet  
9 another application to amend the Complaint.

10 We see that on Monday and --

11 THE COURT: We didn't have Comanche  
12 County asking for a class action at that time  
13 either.

14 MR. O'CONNOR: That's correct.

15 Well, we have in the last month, but  
16 regardless of that, we're now hearing about  
17 another perhaps consolidated -- right now we  
18 have two competing overlapping class actions.  
19 We're hearing that there may be another but we  
20 haven't seen it yet. It's a little hard to  
21 provide our position on it because I don't  
22 know what that Complaint's going to look like.  
23 Right now they're very different class action  
24 allegations. One has California state law  
25 claims. One has a certain period of time

1 that's --

2 THE COURT: All right, fine. Maybe  
3 I've misled you. I'm really interested in  
4 whether or not you object to the filing of the  
5 Third Amended Complaint.

6 MR. O'CONNOR: Our, our --

7 THE COURT: And I'm understanding  
8 that there are allegations that would indicate  
9 they want a class action.

10 MR. O'CONNOR: Right. And if  
11 we're -- you know, if the Third Amended  
12 Complaint that we saw on Monday is the one  
13 that would be the class action allegations, I  
14 don't think we would have objection if this  
15 other Comanche class action complaint either  
16 goes away or is assumed into the one that was  
17 filed Monday. But beyond that I just don't  
18 know what's coming with this proposed  
19 consolidation or resolution.

20 THE COURT: Well, the elephant in  
21 the room is obviously the class action aspect  
22 of this, which we haven't gotten to. But I  
23 don't have any problem with the Third Amended  
24 Complaint, and I'm going to allow the  
25 plaintiff leave to file that Third Amended

1 Complaint. At least in the time frame that  
2 we're in right now, that seems to be helpful  
3 and not harmful, and it kind of gives us a  
4 better base to work with. That includes both  
00:19 5 the Comanche County and the other pending  
6 cases so...

7 Now, I understand you're alluding  
8 to the fact that this could go a lot of  
9 different directions from here, and I  
00:19 10 understand that. I think we're better served  
11 by allowing that Third Amended Complaint.

12 Now, that brings us, according to  
13 my notes, to the biggest timing issue, and I  
14 think that the defendant wants to be able to  
00:20 15 file an early Motion For Summary Judgment on  
16 the dispositive issue of Federal preemption.  
17 The plaintiffs have objected to that and a  
18 brief was filed, I guess this morning by the  
19 defendant with regard to that.

00:20 20 And Mr. Keglovits, it seems like if  
21 you can keep -- if I can keep this from  
22 delaying things too long, that this is  
23 something that needs to be decided fairly  
24 early or you could spend a lot of money  
00:20 25 unnecessarily.

1 MR. KEGLOVITS: Two issues for us,  
2 your Honor. The first is we don't want to be  
3 cut by a thousand knives. We've been coming  
4 to you saying by just denying the preemption  
5 motion, now we've got the next best summary  
6 judgment motion that's really going to make it  
7 efficient for you to consider and show stay of  
8 evidence. As your Honor knows, this case has  
9 been on file for a year and still hasn't  
10 gotten to discovery, so we want to kind of  
11 avoid that scenario. And we also, more  
12 importantly, if your Honor allows the filing  
13 of this summary judgment motion, which they  
14 can file whenever they want to, our preference  
15 would be that it doesn't have impacts on the  
16 other aspects of the case. Because the way  
17 they're presenting it right now, they want to  
18 file a motion and they want to stay everything  
19 else. And as I understand their proposal,  
20 they want to file a motion, present their  
21 summary judgment evidence in a motion, and at  
22 that point we can ask to do discovery of the  
23 information that's in their motion. We think  
24 that's way too restrictive.

25 If we're going to commence the

1 case, and I hope we will, and they have a  
2 motion that they want to get on file in 30 or  
3 60 or 90 days, I would like to use that period  
4 of time to begin discovery on the issues that  
00:22 5 are germane to the motion. So because, as  
6 your Honor knows, sometimes people don't agree  
7 on whether something is discoverable what --  
8 like Magistrate Wilson. There could be a lot  
9 of time wasted. And I hate for them to file a  
00:22 10 motion and then the discovery starts, and we  
11 have long delays until we can get the  
12 discovery resolved and then a response. So in  
13 short, we don't really have a position one way  
14 or the other on when they file this motion so  
00:22 15 long as it's not at the first or the fourth.  
16 But we want the other aspects of the case to  
17 proceed as normal while they're considering  
18 putting together this motion.

19 THE COURT: What type of discovery  
00:22 20 do you feel is necessary to defend the motion?  
21 I mean, you have a good idea of what is  
22 coming.

23 MR. KEGLOVITS: Well, we spent some  
24 time talking with counsel for the defense  
00:22 25 about this proposal and asking questions about

1 what they needed to file. And at that point  
2 it was last week, they didn't have a lot of  
3 specifics about it. But, for example, one of  
4 the questions we asked was: "Do you intend to  
5 have expert affidavits in support of this  
6 motion?" The answer was: "We haven't made  
7 that decision."

8 We know that there are materials  
9 that are provided to the FDA. We are wanting  
10 to get those materials. We've been unable to  
11 get them in unredacted form by way of a FOIA  
12 request. They raised the issue in the  
13 submission that came in earlier this week,  
14 Tuesday or Wednesday, and as I understand it  
15 that didn't get filed in the docket, at least  
16 I haven't seen it on page streaming. But in  
17 that submission they suggest that going  
18 forward as we planned to would make it  
19 impossible for them to create a manufacturing  
20 facility that could comply with both the  
21 Federal and the State law. Well, I think it  
22 would be fair for us to understand something  
23 about their manufacturing processes to try to  
24 rebut that allegation. So those are some  
25 examples of discovery that I think are going

1 to be built into this Motion For Summary  
2 Judgment.

00:24

3 THE COURT: Well, how much time do  
4 you think is necessary for discovery just for  
5 the preemption issue?

00:24

6 MR. KEGLOVITS: I hate to be one of  
7 those lawyers that doesn't give you a straight  
8 answer, but not having seen the motion yet, we  
9 just kind of got a foreshadowing.

10 THE COURT: Do you think you want  
11 to wait until you see the motion before you --  
12 because you want 60 days before he files a  
13 motion?

00:24

14 MR. KEGLOVITS: I'd like to start  
15 on the things that I have identified as being  
16 information we think is going to be germane to  
17 any motion. And then once we get the motion  
18 we can supplement that with germane --

00:24

19 THE COURT: Germane to any issue  
20 indicates discovery on the merits.

00:25

21 MR. KEGLOVITS: I'm sorry, what I  
22 meant was germane to any issue that I see as  
23 arising in the preemption contest. And that  
24 their -- this case is going to present a lot  
25 of discovery that has overlap between the

1 merits and particular issues, class  
2 verification or issues of relevance. It's  
3 hard to put any limits on it.

00:25 4 We understand the efficiencies that  
5 your Honor identified, and we certainly don't  
6 want to go spending a whole bunch of money  
7 collecting millions of gigabytes of ESI and  
8 all kinds of topics if this case determines  
9 motions, so we will be responsible in how we  
00:25 10 approach it. We're just really hesitant to  
11 have your Honor order limitations on us, not  
12 knowing what we're going to get and knowing  
13 how the case is processed to this point.

14 THE COURT: Mr. O'Connor?

00:25 15 MR. O'CONNOR: Your Honor, it  
16 wasn't just a week ago that we had this  
17 discussion. It was -- it was throughout the  
18 process that we have been collaborating and  
19 trying to confer with plaintiffs' counsel. We  
00:26 20 think this is a question of law for the Court  
21 to decide. And as your Honor stated, we think  
22 under the Manual for Complex Litigation and  
23 for the statutes that created MDLs, that it  
24 certainly promotes efficiency and is  
00:26 25 encouraged, particularly when it's potentially



1 a threshold dispositive issue.

2 We would have a motion, and it  
3 would be supported by expert affidavit and  
4 that would bring into consideration the  
5 specific regulation, as well as the USP that's  
6 at issue. There's been an assertion here that  
7 we're not providing the quantity of product  
8 that's on the label, and this Federal  
9 preemption regulation from the FDA, they all  
10 have a specified parameter that we are  
11 required to meet. Beyond that there's a  
12 specification approved by the FDA that even  
13 under their allegations of what has been  
14 received by these institutions would be well  
15 within those parameters. So we have a  
16 situation where we're dealing with a biologic  
17 that's actually grown; there's DNA  
18 enhancements. There's all kinds of -- this  
19 isn't just a pill. It's a -- it's a  
20 complicated, complex biologic that is then  
21 freeze dried and delivered with a sterile  
22 solution to be reconstituted.

23 All of this, as you might imagine,  
24 spent years before the FDA before approval.  
25 And now they're asking that through state

00:28 1 warrant, breach of warranty claims that that  
2 ignore the entire regulatory framework that  
3 exists; that it ignore all of the calibration  
4 of manufacturing and everything else that's  
5 been done and blessed by the FDA. So that's  
6 why we believe it is a threshold issue.

00:28 7 This is not a -- we don't believe  
8 there's a lot of discovery that would be  
9 required on the preemption issue because of  
10 the regulations and the language of the  
11 specifications as well. So we think it is --  
12 we think it does support and promote  
13 everything that the MDL in the name of complex  
14 litigation asks us to do, as well as encourage  
00:28 15 the Court to do.

16 THE COURT: Well, if I agree that  
17 this is the threshold issue and we need to  
18 decide this first, what can you do to  
19 expedite? I think you wanted 60 days from  
00:28 20 today's date to file your Motion.

21 MR. O'CONNOR: (Indicating).

22 THE COURT: But it seems like you  
23 should be giving a lot of this information to  
24 the plaintiffs as soon as possible so that  
00:29 25 we're not -- I don't like the idea of starting

00:29 1 the plaintiffs' discovery after you've filed  
2 your motion in 60 days while they're just  
3 sitting there doing nothing. If you have the  
4 information that you are going to rely on, it  
5 seems like it would be better served if they  
6 can start discovery rather quickly just as to  
7 that issue.

00:29 8 MR. O'CONNOR: And again, I don't  
9 want to invite discovery disputes, but we  
10 haven't seen much limitation on anything that  
11 we've received so far. And so with the  
12 regulation, the expert saying who's -- who is  
13 in the industry and has FDA experience, with  
14 all of that, I just can't imagine. And I  
00:30 15 sensed a little bit of that from what I just  
16 heard, that there are elements of discovery  
17 that would go well beyond this fairly simple  
18 regulatory framework that we've been  
19 preempted as State law claims.

00:30 20 So I -- we would certainly be  
21 willing, your Honor, to engage in and provide  
22 whatever discovery you think is reasonable,  
23 and if the experts relied on it, then we  
24 produce it, whatever that is. I don't  
00:30 25 think that -- we're certainly not trying to

00:30

1 hide anything with respect to the preemption  
2 issue, but we've just never heard any  
3 reasonable fashioning of discovery that would  
4 be aimed at the preemption issue. It's always  
5 been let's go get everything we can under the  
6 sun, and meanwhile, you know, prevent us from  
7 trying to go get key issues if they ever got  
8 to a damages phase on their own  
9 reimbursements, where these institutions are  
10 reimbursed 106 percent of what they pay us, or  
11 113 percent. Well, then, there's a wide range  
12 of what they received, so they have a damage  
13 hurdle too. And I'm getting beyond reaction,  
14 but it's just that it's been difficult to  
15 agree on what that discovery is, and so I've --

00:31

16 THE COURT: Well, I believe your  
17 option is full-blown discovery on preemption,  
18 on class, on merits, starting tomorrow. So it  
19 seems like even if you have disputes that come  
20 up along the way that you're better off  
21 getting your motion heard first in spite of  
22 some potential difficulties.

00:31

23 MR. O'CONNOR: I would agree there.  
24 THE COURT: All right. Mr.  
25 Keglovits, anything else?

1 MR. KEGLOVITS: Just two things,  
2 your Honor. First of all, I don't want you to  
3 leave here with the impression that we think  
4 this is a particularly important motion.

00:32

5 There may have been a whole lot of research  
6 done to create the secret sauce, but when you  
7 pour it in a can and it says it's a 12 ounce  
8 can, it's not too hard to figure out if  
9 there's 12 ounces in a can. And when you know

00:32

10 what the measurement is, it's not too hard to  
11 write down what the measurement is. If you  
12 choose to write down a number that's different  
13 than what you put in, that's the problem. So  
14 all this secret sauce and science aside, this  
15 is a pretty simple case.

00:32

16 Having said that, I just heard now  
17 for the first time that they're going to have  
18 an expert, and I suppose for the first time  
19 we'll get an exact date along with the Motion  
20 For Summary Judgment, which is a little out of  
21 phase with the way issues are typically  
22 presented to this Court. I would think you  
23 could get his affidavit well in advance of the  
24 filing of the motion so we can begin to  
25 understand who we need to get to counter that

00:32

1 affidavit. And you --

2 THE COURT: That's what I thought I  
3 was at least proposing or throwing out is that  
4 the defendant needs to be forthcoming with all  
5 of the information that they have already that  
6 they are going to use in formulating their  
7 Motion For Summary Judgment, and you can start  
8 discovery on that right away.

9 MR. KEGLOVITS: (Indicating).

10 THE COURT: Then after the motion  
11 is filed, I assume you'll want some clean up  
12 time. But, you know, I think this is an issue  
13 that I don't know whether it's that critical  
14 or not; I have no idea at this time. But I  
15 think if it's one that can dispose of the  
16 entire case then we need to go ahead and do  
17 that first. But I don't want to -- I don't  
18 want to end up being six months down the road  
19 just doing discovery on this motion and your  
20 responses and so forth. So it seems like to  
21 me that if the defendant can start giving you  
22 affidavits, information, whatever they already  
23 have possession -- in their possession, and  
24 what they obtain as they go and you can start  
25 discovery on that, well then you wouldn't need

1 more than maybe 30 days after the motion's  
2 filed.

3 MR. KEGLOVITS: Yes, it all depends  
4 on the timing. And it would be helpful today  
00:34 5 if they told us who their expert is or what  
6 her or his qualifications are so we can begin  
7 our search for the right person to address  
8 that.

9 THE COURT: All right. I'm not  
00:34 10 going to -- I'm going to stay the discovery on  
11 the class certification matter and the merits  
12 of the case at this time. I'm going to allow  
13 the defendant to file 30 days from today's  
14 date, unless that falls on a Saturday or a  
00:35 15 Sunday, the Motion For Summary Judgment based  
16 on the preemption. I'm going to require the  
17 defendant to provide the name of any and all  
18 experts that you're aware of by tomorrow, and  
19 any additional experts that you contemplate  
00:35 20 using, well, within 30 days of today's date.  
21 And I want you to begin the process and begin  
22 the process, I mean, like within the next ten  
23 days of providing the plaintiffs with the  
24 material that you are already have.

00:36 25 (Off the Record)

1 THE COURT: I'm -- that apparently  
2 wasn't what I understood. Sixty days to file  
3 a motion. What I want to happen within 30  
4 days is the names of all potential experts,  
5 whatever experts you're aware of right now I  
6 want you to give them tomorrow.

7 But what concerns me is that as  
8 this progresses there may be some changes in  
9 personnel, and what I want to make sure of is  
10 that at some point before this 60 days is up  
11 that everybody knows who's -- who the players  
12 are. And 30 days may be too long, I mean, we  
13 can discuss that. But I want, you know, I  
14 want this to be ongoing. And I want the  
15 discovery to be on issues that bear on or  
16 reasonably might bear on the question of the  
17 Federal preemption, and that should be taken  
18 in a broader sense.

19 I don't agree with the defendant  
20 that it's going to be that narrow. It can be  
21 just wherever your discovery takes you. When  
22 you get -- it gets to the point that it's more  
23 on class or on the merits of the case, then  
24 all you have to do is call, call me or call  
25 the Magistrate and we'll let you know.



1 Now, Mr. Keglovits, what problems  
2 do you see that I've just created?

3 MR. KEGLOVITS: Well, I want to  
4 talk with some of the people who are smarter  
00:38 5 than me before I identify them.

6 The thing that's out there that I  
7 didn't hear in your order was when our  
8 response would come following the filing of  
9 their motion.

00:38 10 THE COURT: Thirty days is what I  
11 intended.

12 MR. KEGLOVITS: All right. Could  
13 we have leave at least to come back to you, if  
14 we think it's going to take more than that,  
00:38 15 because we're having trouble finding an expert  
16 or something like that?

17 THE COURT: You may, but I assume  
18 you're going to -- I assume you already have  
19 some ideas about experts that are out there.  
00:38 20 But sure, thirty days is what I anticipate it  
21 will take you to respond, if you get all the  
22 information that I'm hoping that they're going  
23 to give you. And they're going to be  
24 forthcoming, and you're going to have this  
00:38 25 ahead of time. And if the games start and,

1 you know, switching experts and switching  
2 ideas and reports and stuff then yes, I'll  
3 give you more time.

00:39 4 MR. KEGLOVITS: And then could I  
5 maybe ask your Honor to expedite response time  
6 on Interrogatories, Request for Admission,  
7 Request for Production to make it 15 days  
8 instead of 30, allowing for the compressed  
9 schedule?

00:39 10 THE COURT: I think that's  
11 appropriate. What other? Fifteen days  
12 response time on the Interrogatories?

00:39 13 MR. KEGLOVITS: Written discovery,  
14 and I don't know whether we're going to need  
15 any depositions of their people, but I'm  
16 assuming within this discovery you've outlined  
17 we identify someone we need to depose, we've  
18 got the leeway to do that.

00:40 19 THE COURT: In the case of  
20 Genentech it wasn't a case, it was an order,  
21 the initial case management scheduling order.  
22 They took care of a lot of those things  
23 that -- would that be preferable, the Court go  
24 ahead and order today and give you time frames  
00:40 25 for depositions and spacing depositions be

1 completed, Interrogatories?

2 MR. KEGLOVITS: I think that would  
3 help.

00:40

4 THE COURT: All right. We'll do  
5 that. So that's going to put you on a pretty  
6 short fuse on this. Is everyone prepared to  
7 march forward just on the preemption?

8 MS. DONAHUE: Good morning, your  
9 Honor. I'm Alicia Donahue, I'm the --

00:40

10 THE COURT: Do you need more time  
11 for you to be able to recover from...

00:41

12 MS. DONAHUE: Yes. I'm here  
13 compromised. One issue that is outstanding  
14 that will affect the discovery situation is  
15 that Protective Order. Prior to going to the  
16 GP&L panel and coming back to you, we had a  
17 Protective Order motion with Magistrate Lane.  
18 He entered an Order. There's one provision of  
19 the Protective Order that he entered that we

00:41

20 at Genentech have issue with. We filed an  
21 objection with your Honor and briefed that,  
22 but then new things -- everything started  
23 happening, so that is an issue that's been  
24 standing, and it's very important to Genentech  
25 in terms of their highly confidential information

00:41

1 that much of this discovery; in fact, all of  
2 this discovery will be put on the table.

00:41 3 You know, most of our manufacturing  
4 documents are formulas, are very highly  
5 confidential. They are filed with the FDA,  
6 so, you know, the list is fairly long. And  
7 we'll --

00:42 8 THE COURT: Do you anticipate  
9 reaching these issues in this type of  
10 discovery just on preemption?

11 MS. DONOHUE: I think a lot of it  
12 will, you know, will come into play, but  
13 assuming that discovery is what the  
14 plaintiff's made it sound like. I could  
00:42 15 propose, the only issue that we have on the  
16 order is that we have asked for an attorneys'  
17 eyes only provision for highly confidential  
18 documents.

00:42 19 The order that the Magistrate  
20 entered allows for two designees from each  
21 corporate defendant -- I'm sorry, or corporate  
22 plaintiff to also review the information.  
23 Given that we are now in a class action  
24 situation and there's multiple plaintiffs,  
00:42 25 it's -- Genentech having a right, since it was

1 put out there. So what I would propose, your  
2 Honor, is that unless we have the attorneys'  
3 eyes only provision, and their expert of  
4 course who will need to see it, you know, that  
5 it's kept highly confidential for attorneys  
6 and experts to review and not further than  
7 that at this -- at this stage.

8 THE COURT: Only for the discovery  
9 that's taking place with regards to --

10 MS. DONAHUE: Uh-huh.

11 THE COURT: -- the preemption?

12 MS. DONAHUE: That would be fine  
13 then. If need be, and we feel we needed to  
14 further it, should the provision not take care  
15 of the case, we will be back if need be. But,  
16 you know, hopefully not. Because I do think a  
17 lot of -- a lot of the information we're  
18 concerned about will be coming out in this  
19 phase given the discovery plan that we've --  
20 that has been put in place.

21 THE COURT: Mr. Keglovits?

22 MR. KEGLOVITS: The way it was  
23 played out in front of Magistrate Judge Wilson  
24 was we are concerned that if we're not allowed  
25 to share information with our clients, and

1 most of the officers are clients; most of the  
2 directors of our clients are practicing  
3 oncologists. We benefit greatly from their  
4 help in understanding the information we get.  
00:44 5 So we want to be able to go to them with what  
6 we receive from Genentech and get their views  
7 about it.

8 I don't see a real issue here if we  
9 identify only two representatives of each  
00:44 10 client that we can share this information  
11 with, and we're not talking about punitive  
12 class members.

13 THE COURT: Well, if you have two  
14 of each client, you're up to about 30?

00:44 15 MR. KEGLOVITS: That's right. And  
16 remember, we're not competitors of Genentech.  
17 We're not trying to manufacture these drugs.  
18 All we want to do is present whatever  
19 scientific information comes to people who are  
00:44 20 very skilled in this science. And to do  
21 otherwise bars us to go hire a bunch of people  
22 to do what our physicians probably could do  
23 without hiring anyone. To say nothing of,  
24 ordinarily, unless you've got a competitor  
00:44 25 versus competitor, there aren't restrictions

1 on talking with your clients about the  
2 strengths and weaknesses of the case. So I  
3 just don't see that this issue is properly  
4 placed in this case.

00:45

5 Now remember, this is a patent  
6 communication, so many of these disclosures  
7 have been made so that they can get this  
8 monopoly position. I think it's all presented  
9 in briefs to your Honor that come out of the  
10 appeal.

00:45

11 Our preference would be that your  
12 Honor sustain the decision from Magistrate  
13 Judge Wilson, and that Protective Order apply  
14 to this discovery as well as all the rest of  
15 it.

00:45

16 THE COURT: My understanding  
17 originally was they were worried about  
18 competitive information and pricing information,  
19 and I'm just not sure why we're getting into  
20 much of that on preemptions.

00:45

21 MS. DONAHUE: May I approach, your  
22 Honor?

23 THE COURT: You may.

24 MS. DONAHUE: There were --  
25 originally, when we were dealing with one of

00:45

1 the preemption issues, there were two levels  
2 of confidential information that we were  
3 concerned about. One being on regulatory, you  
4 know, manufacturing information, and then the  
5 other being commercial as you said.

6 Now, we're concerned, you know,  
7 because of where we are with the bench motion,  
8 we're concerned solely about the regulatory  
9 information for this phase. And I wanted to  
10 add that if the plaintiffs were to go to the  
11 FDA and request, for instance, our  
12 biologically -- or biological licensing  
13 application, it would come back to them highly  
14 redacted because of the trade secret

15 information that's contained there. And we  
16 cited cases in our brief, but I think also  
17 it's just -- it's a great, you know, fear for  
18 Genentech that even, you know, the two people  
19 that may be designated from each of these  
20 entities, even though they're not competitors,  
21 per se, and they're not seen as doing business  
22 with them, once the information's out there,  
23 it's a very slippery slope. And given the  
24 level of highly, highly, highly confidential  
25 trade secret information that we're talking



1 about, I cannot overstate the importance of  
2 this issue from Genentech's, you know,  
3 competitive and trade secret point of view.  
4 It's just -- it's so important to them, so...  
00:47 5 and I don't think that we're asking for too  
6 much; the attorneys' eyes only and the expert  
7 person matter because it will be covered under  
8 the confidentiality agreement. And if others  
9 need to see it, we can address that on a  
00:47 10 case-by-case basis.

11 But given the number of plaintiffs  
12 we've got and the type of information we're  
13 talking about at this point, we would  
14 respectfully request our point of view. Thank  
00:48 15 you.

16 THE COURT: All right. I'm going  
17 to sustain Magistrate Wilson's position and  
18 order on the Protective Order with the  
19 exception that, you know, we'll entertain on a  
00:48 20 case-by-case basis the specific matters that  
21 relate to trade secrets and pricing.

22 Is there anything else that's  
23 beyond those two things that are -- seem to be  
24 creating this spurn? Okay.

00:49 25 Electronically stored information,

1     apparently you were attempting to come to an  
2     agreement on that, and it's broken down or has  
3     it been addressed of late? Is there any  
4     reason you can't have the PSI protocol  
5     finalized by the time the Motion For Summary  
6     Judgment is ripe?

7                   MR. KEGLOVITS: I wouldn't think  
8     so, your Honor, but the hang up has been how  
9     many custodians it serves. Genentech has  
10    proposed that we agree to some fixed number,  
11    but we have said is we don't really know  
12    enough about an inspection process to know how  
13    many people served in a particular role over a  
14    number of years, how many roles there are. I  
15    think our preference would be to have them  
16    explain to us how the manufacturing process  
17    works and whose got what titles; how the  
18    marketing process works and whose got what  
19    titles, and then identify for them which of  
20    those titles we want you to search ESI for  
21    over those.

22                   As I understand it the way we came  
23    to kind of a bump in the road, and then the  
24    subsequent filings kind of took us off of the  
25    ESI track because of the trip to the MDL.

1 MR. O'CONNOR: To answer your  
2 question, I think we could reach an agreement  
3 by the time the Summary Judgment is ripe.

4 THE COURT: Thank you. And if  
00:50 5 there are problems, of course, we'll handle  
6 those as they come up. It seems like they'd  
7 like for you to have future status conference  
8 dates in place. I'm not sure we're ready for  
9 that. You know, I think we might have a  
00:51 10 shorter discussion just with lead counsel and  
11 co-lead counsel and the defendant's counsel  
12 maybe in September to see where we are, and  
13 we'll try to find a date that works for  
14 everybody. But I don't -- I don't think we're  
00:51 15 going to need a full-blown status conference  
16 at that time. All right. What could we have  
17 that I've not addressed or we have not  
18 addressed?

19 MR. KEGLOVITS: From the  
00:51 20 plaintiffs' respective, we're good.

21 MR. O'CONNOR: Agreed, your Honor.

22 THE COURT: Okay. It's been nice  
23 seeing you all. We won't I'm going to go  
24 Santa Barbara for July so I won't see you  
00:52 25 then. Let's see, all right, or you might

1 indicate to Ashley your schedules in September  
2 and compared with mine and see if there's a  
3 time where we can just have a little get  
4 together and not as formal as this and just  
00:52 5 kind of see where we are and then map out some  
6 future conferences from that point forward.

7 MR. KEGLOVITS: The joint panel on  
8 multidistrict litigations was kind enough to  
9 invite us to Santa Barbara to have argument on  
00:52 10 the question of consolidation -- and I think I  
11 will speak for Alicia, but we found it a very  
12 helpful place to have arguments, so if your  
13 Honor's inclined, maybe that would be good or  
14 maybe not.

00:53 15 (Off the Record)

16 THE COURT: All right. Thank you  
17 all.

(RECORD CONDLUED)

CERTIFICATE

STATE OF OKLAHOMA     )  
                                      )     ss.  
COUNTY OF TULSA        )

I, Elizabeth Ann Behles, a Certified  
Shorthand Reporter in and for the State of  
Oklahoma, do hereby certify that the above  
Transcript of Hearing was taken by me on the  
23rd day of June 2016 and thereafter transcribed.

IN WITNESS WHEREOF, I have hereunto  
set my hand this 28th day of June, 2016.

s/Elizabeth Ann Behles, CSR #121